October 16, 2000

SENT VIA E-MAIL, U.S. MAIL AND/OR
FEDERAL EXPRESS

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, 445 12th Street S.W.
Suite CY-B402
Washington, DC 20554

re: In the Matter of Application by Verizon New England, Inc., for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts (CC Docket No. 00-176).

Dear Ms. Salas:

Enclosed for filing in the above matter please find one original and seven hard copies and one 3.5 inch computer diskette containing the Massachusetts Attorney General's Comments in the above-referenced proceeding. Please stamp one hard copy and return it to us in the enclosed prepaid, self-addressed envelope. I have filed a copy of the comments electronically with the Commission's ECFS service (proceeding number 00-176) and, as directed in the September 22, 2000 Public Notice, have sent twelve copies to Janice Myles of the Policy and Program Planning Division, and one copy to ITS.

Sincerely,

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division

KJR/kr
Enc.
cc: Janice Myles, CCB (w/12 enc.)
International Transcription Service (w/enc.)
Attached Service List (w/enc.)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts	)	CC Docket 00-176

MASSACHUSETTS ATTORNEY GENERAL'S COMMENTS ON VERIZON NEW ENGLAND, INC.'S APPLICATION FOR AUTHORIZATION UNDER SECTION 271 OF THE COMMUNICATIONS ACT TO PROVIDE IN-REGION, INTERLATA SERVICE IN THE STATE OF MASSACHUSETTS

Respectfully submitted,

THOMAS F. REILLY
MASSACHUSETTS ATTORNEY GENERAL

By: George B. Dean, Chief
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Dated: October 16, 2000

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Before the
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The Attorney General of the Commonwealth of Massachusetts, Thomas F. Reilly ("Massachusetts Attorney General"), urges the Federal Communications Commission ("FCC" or "Commission") to withhold approval of the September 22, 2000, Application ("Application") filed by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. (collectively, "Verizon" or "the Company"), with the Commission for authority to provide in-region interLATA service in the Commonwealth of Massachusetts pursuant to Section 271 of the Telecommunications Act of 1996.[1] The Commission should deny the Application because Verizon has not demonstrated that it has satisfied Checklist Item Number 2 (Unbundled Network Elements or "UNEs"), Checklist Item Number 3 (Pole Attachments), and

[1] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act").

Checklist Item Number 4 (UNE loops - hot cut scoring), as required under the Act.[2]

I. SUMMARY OF ARGUMENT

As a requirement for entry into the long distance market in Massachusetts, Verizon must demonstrate that it has opened irreversibly its local markets to competition. This demonstration requires, among other things, satisfaction of the fourteen point checklist of items contained in Section 271 of the Act ("Checklist"). The Commission should not approve Verizon's Application at this time because Verizon has not demonstrated satisfaction of three Checklist Items:

(1) that it provides nondiscriminatory access to unbundled network elements (Checklist Item Number 2);

(2) that it provides nondiscriminatory access to its telephone poles and attachments (Checklist Item Number 3); and

(3) that it provides nondiscriminatory access to unbundled loops (Checklist Item Number 4).

This conclusion is reinforced by the fact that the types of state mechanisms that the Commission has relied upon in previous Section 271 orders to provide for post-approval monitoring and enforcement are not sufficient in Massachusetts to ensure that Verizon will continue to meet its Section 271 obligations after entry into the long distance market.

II. ARGUMENT

A. Verizon Has Not Complied With Checklist Items Numbers 2, 3 and 4.

Verizon has failed to demonstrate that it has opened the local market to competition as

[2] These three Checklist Items are codified as 47 U.S.C. § 271(c)(2)(B)(ii - iv) of the Act.

measured by Checklist Items Numbers 2, 3 and 4 regarding UNE pricing, pole attachments, and unbundled loops (scoring hot cuts). The Attorney General will discuss these Checklist Items in the order of their estimated significance in affecting local market competition.

1. Verizon has not satisfied Checklist Item Number 2 - UNE Pricing

Verizon has not demonstrated its compliance with Checklist Item Number 2 regarding UNE pricing. Unrebutted record evidence indicates that Verizon's UNE switching prices are excessive, not TELRIC-based, and create a price squeeze that is a barrier to market entry for Verizon's competitors. In particular, unrebutted evidence shows that, at least in certain circumstances, Verizon's UNE switching rates result in wholesale costs to competitors that exceed the Company's retail rates for the same services. The Massachusetts Attorney General submits that, based on past Commission precedent on the resolution of pricing disputes, the Commission should not find that the Company has demonstrated satisfaction of Checklist Item Number 2 unless and until the Massachusetts Department of Telecommunications and Energy ("DTE") establishes interim rates, opens an investigation into the price squeeze issues, and

provides that the interim rates are subject to true-up (refund).[3]

Unrebutted evidence supports findings that: (1) Verizon's Massachusetts UNE switching prices for port and switching usage are multiples of the analogous rates in New York and Pennsylvania (50 to 200 percent in the case of usage rates), and (2) the Massachusetts UNE switching prices are based on switch "costs" that are inconsistent with both the FCC's TELRIC benchmarks and the Company's own accounting of its switch costs. First, WorldCom has provided unrebutted evidence that Verizon's average monthly switching usage charge in Massachusetts is $15.83, whereas it is $10.60 in New York and $5.02 in Pennsylvania (WorldCom Ex Parte Presentation [October 2, 2000], CC Docket 00-176, Part 2 at 2 ["WorldCom Ex Parte"]) and that Verizon's monthly switching port charge in Massachusetts is $4.49, whereas it is $2.50 in New York and $1.90 in Pennsylvania (May 18, 2000 letter to Mary Cottrell from Christopher J. McDonald re: WorldCom's Suggested Course of Action; Tr. Vol. 24,

[3] On October 13, 2000, Verizon filed proposed revisions to its UNE line ports, local switching and transport usage rates and reciprocal compensation charges in the form tariff revisions to Tariff No. 17. Although the filing was represented to accomplish the adoption of the analogous Verizon UNE rates now in place in New York, the Massachusetts Attorney General has not yet had an opportunity to review that filing and will address that filing in his Reply Comments.

pp. 4632-4636). The Company has not attempted to rebut this evidence, much less provide any rationale that could support such a divergence in the cost for the same services in different states. Even though the Z-Tel agreement included lower, promotional switching usage rates — $14.57 (WorldCom Ex Parte, Part 2 at 2) — the discrepancy remains.

Second, the Verizon UNE switching rates are based on the Company's assertion that its TELRIC switching "costs" are $2.6 billion, whereas the Commission's TELRIC model indicates that the costs should be $500 million and the Company's own books show a contemporaneous (*i.e.*, 1995) gross investment of $1.4 billion and a net depreciated investment of $600 million (WorldCom Ex Parte, Part 1 at 17-18). These circumstances, together with the fact that the Company's average retail price for these local service elements is $24 per month (May 18, 2000 letter to Mary Cottrell from Christopher J. McDonald re: WorldCom's Suggested Course of Action; Tr. Vol. 24, pp. 4632), constitute a clear showing that there is a real question regarding the appropriateness of the Company's UNE prices, whether they are TELRIC-based, and whether they are unjust, unreasonable and create an anti-competitive barrier to entry.

This unrebutted evidence of a price squeeze, creating an anti-competitive barrier to market entry, raises a pricing dispute of the type which the Commission addressed in its New York and Texas Approval Orders.[4] In these Orders, the Commission determined that such pricing disputes

[4] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, (rel. December 22, 1999) ("New York Approval Order") at ¶¶ 237-262; *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc d/b/a Southwestern Bell Long Distance*, Memorandum Opinion and Order, CC Docket No. 00-65 (rel. June 30, 2000) ("Texas Approval Order") at ¶¶ 231-242.

would not result in denial of a Section 271 application so long as: (1) the state commission is currently considering the matter; (2) interim rates are in place pending resolution of the dispute; (3) the state commission demonstrates a commitment to following the FCC's TELRIC pricing rules; and (4) the interim rates provide for refunds or true-ups once permanent rates are set.[5] Three of the four conditions do not exist in Massachusetts.[6] The DTE is not currently considering the matter and no interim rates are in place, so there is no provision for true-up/refunds once

[5] New York Approval Order at ¶¶ 250, 257-260; Texas Approval Order at ¶¶ 236, 237, 241.

[6] The Massachusetts Attorney General does not question that the DTE is committed to follow the FCC's TELRIC pricing rules.

permanent rates are set.[7]

[7] It should be emphasized that this issue is not being raised here for the first time and that the Massachusetts Attorney General and others sought to have this issue addressed in a timely manner that would have avoided the need to withhold approval of the Company's application at this time. The need to examine some or all of the Company's recurring UNE rates was raised as early as the March 13, 2000, petition by AT&T Communications of New England ("AT&T") seeing an investigation into the Company's UNE rates. WorldCom and Z-Tel submitted comments and testimony to support that request, alleging that the Company's UNE switching prices (port and usage) are excessive, not TELRIC-based, and create a price squeeze that is a barrier to market entry. See Petition of AT&T, dated March 13, 2000; comments filed by WorldCom on March 23, 2000, and May 18, 2000; comments filed by Z-Tel on April 12, 2000; and Tr. Vol. 24 at 4628-4671, 4673-4677. WorldCom suggested, in its May 18 comments, a procedural schedule that provided for resolution of the essential issues within five months. While the Massachusetts Attorney General urged the Department to open such an investigation in a pleading filed on May 30, 2000 (included as "Attachment B"), the DTE declined to open an investigation. The DTE based its decision on the following grounds: (1) Verizon and Z-Tel had recently entered into an interconnection agreement amendment that offered promotional discounts with reduced switching charges that AT&T, WorldCom and others could adopt; (2) the current five-year-old prices were based on a TELRIC study; and (3) it would be inefficient to conduct an investigation while the FCC's TELRIC pricing rules area in flux due to the Eighth Circuit's recent decision regarding

those pricing rules. DTE 99-271, Letter Order (July 28, 2000) at 3.

2. Verizon has not satisfied Checklist Item Number 3 (Pole Attachments)

Verizon has not demonstrated that it provides access to poles, ducts, conduits, and rights-of-way under terms and prices that are reasonable and nondiscriminatory. Unrebutted record evidence shows that Verizon's existing policies allow it to favor itself over other parties. In particular, Verizon requires that competitors move their pole attachments within 15 days after it requests access to a pole, but allows itself up to seven and one-half months to comply with a competitor's request for access;[8] it requires that it be allowed to reserve space on poles for one year, but allows competitive local exchange carriers ("CLECs") to reserve pole space for only 90 days;[9] and it requires CLECs to "tag" or identify their lines, but does not tag its own lines.[10] Clearly, these disparities in treatment do not represent nondiscriminatory access. The Massachusetts Attorney General, therefore, submits that until those issues are resolved, the

[8] See generally pages 13-29 of the July 18, 2000 comments filed by the New England Cable Television Association ("NECTA") in DTE 99-271, and Tr. Vol. 20, pages 4099-4200.

[9] *Id.*

[10] *Id.*

Commission should not grant Verizon its Section 271 approval in Massachusetts.[11]

3. Verizon has not satisfied Checklist Item Number 4 - Unbundled Loops (Hot Cuts)

[11] Verizon stated during final oral arguments that it is willing to negotiate a resolution to end this dispute of discriminatory treatment of competitors (Tr. Vol. 28 at 5622), but absent record evidence of such a resolution that is found to be consistent with the public interest, there is no basis upon the Commission can conclude that this Checklist Item has been satisfied.

Verizon has not demonstrated that it is providing nondiscriminatory access to unbundled loops because Verizon has not yet resolved a dispute over a "hot cut" data scoring problem raised during the course of hearings before the DTE. In particular, AT&T asserted that Verizon did not measure its hot cut misses accurately, asserting that Verizon miscategorized at least five percent of its orders.[12] While Verizon contends that AT&T's claims are erroneous,[13] it remains unclear whether Verizon is accurately reflecting its hot cut performance.[14] The Commission stated that hot cut deficiencies was a critical factor in the New York and Texas Approval Orders, so any unresolved hot cut issue merits special attention.[15] Absent evidence that the hot cut scoring problem raised by AT&T is solved, Verizon has not demonstrated that it has met all its obligations to provide nondiscriminatory access to unbundled loops.

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[12] Tr. Vol. 23 at 4435; Comments of AT&T Communications of New England, Inc. Regarding Partial Data Reconciliation, DTE 99-271, filed September 28, 2000 ("AT&T September 28 Comments").

[13] Tr. Vol. 27 at 4411.

[14] AT&T insists, in its September 28, 2000 Comments, that the data discrepancy has not been reconciled and is awaiting the DTE's resolution of the issue. AT&T September 28, 2000 Comments, DTE 99-271, at 5.

B. Existing State Mechanisms Are Not Sufficient To Assure Verizon's Continued Compliance With Checklist Items.

[15] New York Approval Order at ¶¶ 278, 291-309; Texas Approval Order at ¶¶ 256-273.

As part of its Section 271(d)(3)(C) "public interest" analysis,[16] the Commission considers the presence of related state enforcement mechanisms in evaluating an applicant's satisfaction of the 14-point Checklist. These mechanisms in Massachusetts are not sufficient to ensure that Verizon will continue to comply with the Checklist.[17] First, there remain questions concerning whether Verizon intentionally misled the DTE and other parties during their consideration of the Massachusetts Performance Assurance Plan ("PAP").[18] Second, the DTE has yet to finalize its expedited procedures to resolve carrier-against-carrier disputes (*Accelerated "Rocket" Docket),* D.T.E. 00-39.[19]

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[16] Section 271(d)(3)(C) provides that: "The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that - (C) the requested authorization is consistent with the public interest, convenience, and necessity."

[17] The Massachusetts Attorney General assumes that in the event Verizon is ultimately allowed to enter the long distance market, the Commission will exercise its post-approval monitoring and enforcement authority under Section 271(d)(6), if necessary, to suspend or revoke Verizon's interLATA authority, as described in the New York Approval Order at ¶¶ 446-453.

[18] On September 28, 2000, AT&T filed a Motion to Reconsider the PAP, in which it alleged that Verizon has intentionally misrepresented or failed to identify six additional key differences between the PAP approved in the New York Approval Order and that proposed by Verizon on April 25, 2000. In addition to revisions to the domain clustering section, the alleged differences concern the elimination of (1) scoring for small sample sizes, (2) a bill credit allocation method, (3) provision for a refund check, instead of bill credits for carriers no longer doing business within the state, (4) electronic data interface in "special provisions" and (5) resale flow-through metrics from the Massachusetts PAP. AT&T also asked the DTE to clarify issues regarding procedural triggers, audit requirements, and Verizon's annual review.

[19] Rhythms Links filed a motion to reconsider the sufficiency of the Massachusetts PAP on the grounds that the PAP does not contain enough DSL metrics (Rhythms Motion for Reconsideration, September 25, 2000; See also Attachment A at 2, and Attachment C at 2, 9-10). The DTE has not addressed this motion, but the DTE has ordered that new DSL metrics presently under consideration in New York shall be incorporated into the Massachusetts PAP upon their adoption by the New York Public Service Commission.

III. CONCLUSION.

The Commission should not approve the application by Verizon to enter the long distance Massachusetts market because it has not demonstrated compliance with the entire 14-point Competitive Checklist contained in Section 271 of the Act. At this time there remain unsatisfied at least three Checklist items: (1) UNE pricing (Checklist Item Number 2), (2) Pole Attachments (Checklist Item Number 3), and (3) UNE loop hot cuts (Checklist Item Number 4).

Respectfully submitted,

THOMAS F. REILLY
MASSACHUSETTS ATTORNEY GENERAL

By: George B. Dean, Chief
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Dated: October 16, 2000

MA Attorney General's 10/16/00 Comments - CC Docket 00-176 Verizon-MA

ATTACHMENT A

MASSACHUSETTS ATTORNEY GENERAL'S APRIL 25, 2000 COMMENTS TO THE DTE IN DTE 99-271

April 25, 2000

Sent via e-mail and either fax, hand-delivery or U.S. Mail

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

re: Bell Atlantic's Section 271 Filing, D.T.E. 99-271

Dear Secretary Cottrell:

Enclosed for filing please find the Comments of the Attorney General on the content and structure of a Performance Assurance Plan ("PAP") in the above docket pursuant to the March 28, 2000, Memorandum of the Hearing Officers, together with a Certificate of Service.

Sincerely,

_____

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division

KJR/kr
cc: Robert Howley, Hearing Officer (w/enc.)
Cathy Carpino, Hearing Officer (w/enc.)
Tina W. Chin, Hearing Officer (w/enc.)
Service list for D.T.E. 99-271 (w/enc.)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Inquiry by the Department of Telecommunications and Energy pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market.	)	D.T.E. 99-271

COMMENTS OF THE ATTORNEY GENERAL
ON THE PERFORMANCE ASSURANCE PLAN

Pursuant to the March 28, 2000, Memorandum of the Hearing Officers, the Attorney General recommends that the Department of Telecommunications and Energy ("Department") adopt a Performance Assurance Plan ("PAP") for Bell Atlantic-Massachusetts ("BA-MA") that incorporates the Bell Atlantic-New York ("BA-NY") Amended PAP filed April 7, 2000,[20] modified for Massachusetts-specific conditions and real-life application of the PAP.

[20] *See* New York Public Service Commission ("NYPSC") Cases 97-C-0271 and 99-C-0949 - *Bell Atlantic Compliance Filing* - Performance Assurance Plan, filed April 7, 2000. A copy of the updated BA-NY PAP can be downloaded from the NYPSC's 271 web site, <www.dps.state.ny.us/tel271.htm>.

I. INTRODUCTION

As part of the Department's investigation into BA-MA's draft filing under Section 271 of the Telecommunications Act of 1996 for entry into the in-region interLATA (long distance) telephone service market, the Department sought recommendations for Performance Assurance Plans ("PAP") from BA-MA and other participants in this docket. The Attorney General urges the Department to adopt a PAP based on the BA-NY PAP, including three important elements:

(1) The BA-MA PAP should include an annual penalty cap of at least $278 million to deter BA-MA from "backsliding" -- providing substandard or discriminatory services to competitive local exchange carriers ("CLECs") -- if and when the Federal Communications Commission ("FCC") approves BA-MA's Section 271 application. A PAP cap at this level will encourage BA-MA to resolve promptly all PAP-related compliance problems, and can be used to compensate CLECs who suffer from substandard service they receive from BA-MA.

(2) The BA-MA PAP must allow the Department to revise the Carrier-to-Carrier ("C2C") performance metrics, the PAP cap, and the Change Control Assurance Plan ("CCAP") as necessary.

(3) PAP performance data must be validated using a Quality Assurance Program ("QAP"). Consumers should not pay for BA-MA's penalties and lost revenues resulting from BA-MA's below-par performance under the PAP and CCAP.

II. THE PAP CAP MUST BE HIGH ENOUGH TO DETER BACKSLIDING, ENCOURAGE PROMPT PROBLEM-SOLVING, AND COMPENSATE CLECS.

The Attorney General submits that the Department should set a penalty cap at a level that provides a meaningful incentive for BA-MA not to backslide on its Section 271 commitments to CLECs, to solve PAP-compliance problems (such as BA-NY's current operations support systems ["OSS"] problems), and to compensate CLECs who suffer if BA-MA does not cooperate in opening the local markets. Massachusetts consumers ultimately will bear the burden of any substandard conduct -- which will defeat the Congressional policy goals of securing improved

services at lower prices by fostering competition in Massachusetts -- and the Department must adopt a PAP with sufficiently robust penalty provisions to minimize that burden.

The NYPSC's experience suggests that the PAP cap formula set by the FCC[21] -- which produces a BA-MA cap of $142 million (about 36% of BA-MA's total profits derived from local exchange service for 1999 ["Total Net Return"]) -- is inadequate. This formula should be revised in light of New York's real-life experience following the FCC's approval of BA-NY's Section 271 application. The Department should select a PAP cap within a range of no less than $162 million (which represents 41% of BA-MA's 1999 Total Net Return,[22]) and no more than

[21] The FCC PAP cap penalty formula is based on BA-NY's net revenues derived from local exchange service. The FCC evaluated whether the BA-NY PAP Cap was sufficient to deter substandard performance by comparing the $269 million PAP Cap to a calculation of BA-NY's "Total Net Return" using the FCC's Automated Reporting Management Information System ("ARMIS") data. The Total Net Return represents the total operating revenue less operating expenses and operating taxes, and is a reasonable approximation of total profits derived from local exchange service, according to the FCC. *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404, Memorandum Opinion and Order (released December 22, 1999) ("FCC New York Order") at ¶ 436. The FCC's formula incorporates both interstate and intrastate net revenues because the FCC found that BA-NY may derive benefits in long distance from retaining local market share. *Id*. The Total Net Return figure combines the interstate net return (column h, line 1915) with the computed net intrastate return, which combined the total intrastate operating revenues (column g, line 1090) and other operating income (column g, line 1290), less operating expenses (column g, line 1190), nonoperating items (column g, line 1390), and annual taxes (column g, lines 1490 and 1590). ARMIS 43-01 Annual Summary Report, Table 1, Cost and Revenue Table (1998); FCC New York Order at ¶ 436, n. 1332.

[22] The NYPSC's former PAP cap, $269 million, represents 36% of BA-NY's 1998 Total Net Return, and the FCC determined that the NYPSC's PAP cap was sufficient, in theory, to deter substandard performance and compensate affected CLECs; however, as discussed herein, the NYPSC subsequently raised that cap to $303 million, consisting of $24 million for additional metrics in response to real-life experience and $10 million in additional bill credits to CLECs for substandard service. FCC New York Order at ¶ 436; NYPSC Case Nos. 00-C-0008, 00-C-0009, and 99-C-0949, March 23, 2000, Order Directing Market Adjustments and Amending

$394 million (which represents 100% of BA-MA's 1999 Total Net Return). The Attorney General recommends that the Department adopt a $278 million PAP cap (the mid-point of the range, or 70.5% of BA-MA's 1999 Total Net Return). This cap provides a meaningful incentive for BA-MA to adhere to the Department's performance metrics, and will accommodate any additional penalties and additional metrics which the Department may need to impose following BA-MA's entry into the long distance market.

The NYPSC increased the BA-NY PAP cap above the amount set by the FCC by $24 million annually to cover three new flow-through metrics added on March 23, 2000, in response to BA-NY OSS problems.[23] In the same order, BA-NY agreed to pay an additional $10 million in bill credits above the PAP cap penalties for poor service BA-NY rendered to CLECs from January 1, 2000, to March 9, 2000.[24] These additions brought the effective BA-NY PAP cap up from the original $269 million to $303 million, an increase of $34 million above the FCC's formula. The New York experience shows that the FCC PAP cap formula does not produce an amount that is consistent with the aggregate level of penalties that may be imposed

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Performance Assurance Plan ("NYPSC March 23, 2000, Order") at 4. The NYPSC's new PAP cap, $303 million, represents 41% of the BA-NY's 1998 Total Net Return.

[23] NYPSC March 23, 2000, Order at 4.

[24] NYPSC March 23, 2000, Order at 3.

under the PAP. Consequently, the Attorney General recommends that the Department adopt a $278 million PAP cap. Anything less will not deter BA-MA substandard conduct, encourage prompt resolution of PAP-compliance problems, or provide adequate coverage for CLEC compensation if BA-MA is unable to meet its PAP obligations.

III. CONSISTENT WITH THE NEW YORK EXPERIENCE, THE DEPARTMENT MUST RETAIN DISCRETION TO REVISE PAP PROVISIONS AS NEEDED.

The Attorney General urges the Department to retain discretion in the BA-MA PAP to meet post-FCC approval needs to create new metrics (*e.g.*, line sharing[25]), revise current metrics, and reallocate unused penalties among the PAP components, as the Department deems appropriate. The penalty cap should be divided among components analogous to the BA-NY PAP: (1) four Modes of Entry ("MOE"),[26] (2) doubling provisions,[27] (3) Critical Measures,[28]

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[25] Line sharing allows CLECs to compete with BA-MA to provide consumers with xDSL-based services through telephone lines that the CLECs share with BA-MA. The FCC now requires incumbent local exchange carriers like BA-MA to provide CLECs with unbundled access to the high frequency portion of the local loop, which is a key element of line sharing. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (released December 9, 1999).

[26] A Mode of Entry ("MOE") is the method by which CLECs may use to enter the local service market. The four MOEs identified by the NYPSC are Resale, Unbundled Network Elements, Interconnection, and Collocation, and are used to evaluate the local service market as a whole. In New York, substandard performance results in market adjustments, or bill credits, and are calculated monthly, paid quarterly. Market adjustments for substandard performance in the MOE component are paid to CLECs based on lines in service, minutes of use, or collocation cages due. The BA-NY PAP uses a statistical methodology to calculate whether BA-NY is providing service to CLECs at parity to the service BA-NY provides to its own retail customers. The NYPSC allocated $75 million of the BA-NY PAP cap for MOE.

[27] The BA-NY doubling provisions will be activated if BA-NY's PAP scores for March 2000 remain in the negative range for the third consecutive month. MOE penalties may be doubled up

(4) Special Provisions,[29] and (5) a Change Control Assurance Plan ("CCAP").[30] The Department should adopt a CCAP similar to the BA-NY CCAP to measure the ability of BA-MA to implement and inform CLECs of software changes to BA-MA's interface systems, such as BA-MA's current change from LSOG-2 and LSOG-3 to LSOG-4 for the pre-ordering, ordering, and provisioning functions.

The Attorney General submits that the BA-MA PAP should contain a subset of the key competition-affecting metrics that measure performance and detect degradations of service to new entrants. Furthermore, the Department must maintain an ongoing review of the metrics and allow the PAP to evolve to reflect changes in the telecom industry and the Massachusetts market.[31] Moreover, the BA-MA PAP must allow the Department to increase the PAP cap limit should

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to an additional $75 million.

[28] The Critical Measures component measures BA-NY's performance in areas that are the most sensitive and important to encouraging local competition. The thirteen areas in the BA-NY PAP are: OSS Interface Response Time, OSS Interface Availability, Percent On Time Ordering Notification, Percent Missed Appointment - BA - Total - EEL, Percent Missed Appointment, Percent Missed Appointment - BA - No Dispatch - Platform, Hot Cut Performance, Percent On Time Performance for UNE LNP, Mean Time to Repair, Percent Repeat Reports Within 30 Days, Final Trunk Group Blockage, Collocation Performance, and xDSL measures (BA-NY PAP, Appendix G, PAP/CCAP Market Adjustment Summary). The NYPSC allocated $75 million of the BA-NY PAP cap for the Critical Measures component.

[29] The Special Provisions component creates target incentives for BA-NY to achieve performance in flow-through, order processing, and hot cuts, or else pay market adjustments to affected CLECs for missed targets. NYPSC Case Nos. 97-C-0271 and 99-C-0949, Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan, November 3, 1999, at 4-5. The NYPSC allocated $58 million of the BA-NY PAP cap for the Special Provisions component.

[30] The NYPSC allocated $10 million of the BA-NY PAP for the CCAP.

[31] FCC New York Order at ¶ 438.

circumstances dictate the addition of new performance metrics.[32]

Finally, the New York experience demonstrates that the PAP must include, and the Department must use, provisions which allow the Department to reallocate speedily available bill credits. Failure to do so will weaken Bell Atlantic's incentive to resolve its PAP problems in an expeditious manner and "will delay competitive service offerings to customers to the detriment of the general welfare." NYPSC Case Nos. 00-C-0008 and 00-C-0009, Order Directing Improvements to Wholesale Service Performance (issued February 11, 2000) at 3.

IV. THE DATA MUST BE VALIDATED AND PENALTIES MUST NOT BE SHIFTED TO RATE PAYERS.

The Department should verify BA-MA's performance data by employing methods similar to those used in New York. As in New York, the Department should require BA-MA to create a

[32] On January 14, 2000, the Department adopted the New York C2C Guidelines as Attachment A to the Department's Master Test Plan, referenced in the Department's November 19, 1999, Letter Order ("Letter Order"). According to the Department, the Master Test Plan performance metrics will consist of the New York C2C Guidelines, as modified periodically by the NYPSC, and will be used to gauge Bell Atlantic-Massachusetts' compliance with Section 271 of the Telecommunications Act of 1996 (Letter Order at 2).

Quality Assurance Program ("QAP") to document and verify its data in an open, reviewable manner, with an internal mechanism to resolve CLEC disputes before bill credits for a given month are due. The Attorney General recommends that the Department require BA-MA to develop and file a draft QAP, allow the CLECs and Attorney General an opportunity to comment on the draft QAP, and finalize the QAP no later than ten business days after the Department approves the PAP.

The Department should perform an annual review of the data and performance measures to assure that the local markets remain open. Furthermore, the Department should require BA-MA to provide performance data to the Department, the CLECs, and the Attorney General for the life of the PAP. Additionally, and to the extent feasible given staff and budget constraints, the Department should review and monitor regularly the raw performance data so that it need not rely just on CLEC claims of substandard performance. The Department should allow CLECs and the Attorney General to monitor BA-MA's post-FCC approval performance on a daily and/or weekly basis should BA-MA experience OSS problems or other difficulties meeting its PAP obligations, as is done in New York.

Finally, the Department should prevent BA-MA from recovering its penalties or lost revenues from Massachusetts rate payers. Local telephone customers should not bear the costs of BA-MA's mistakes or anticompetitive conduct. Specifically, the Department should find that all bill credits, market adjustments, penalties and resulting lost revenues incurred by BA-MA as a result of its inability to meet its obligations under the PAP and CCAP are not to be considered

exogenous costs under the terms of its Price Cap Plan (*NYNEX*, DPU 94-50 [1995]).[33]

V. CONCLUSION

For all the foregoing reasons, the Attorney General urges the Department to adopt a Bell Atlantic-Massachusetts Performance Assurance Plan which follows the New York template, modified for Massachusetts-specific circumstances and real-life application. The PAP should include an annual penalty cap of $278 million, flexible provisions, a Change Control Assurance

[33] Neither the NYPSC nor the FCC allowed BA-NY to recover penalties or lost revenue from state or federal ratepayers in the form of increased rates or as expenses to revenues (FCC New York Order at ¶ 443).

Plan, a Quality Assurance Program, and prohibitions against passing along the costs of compliance to Massachusetts rate payers.

RESPECTFULLY SUBMITTED

THOMAS F. REILLY
ATTORNEY GENERAL

by: Karlen J. Reed
Assistant Attorney General
Regulated Industries Division
Public Protection Bureau
200 Portland Street
Boston, MA 02114
(617) 727-2200

Dated: April 25, 2000

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Inquiry by the Department of Telecommunications and Energy pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market.	)	D.T.E. 99-271

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by e-mail and either hand-delivery, mail, or fax.

Dated at Boston this 25th day of April 2000.

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division
200 Portland Street, 4th Floor
Boston, MA 02114
(617) 727-2200

ATTACHMENT B

MASSACHUSETTS ATTORNEY GENERAL'S MAY 30, 2000 COMMENTS TO THE DTE IN DTE 99-271

May 30, 2000

Sent via e-mail and either U.S. mail, fax, or hand-delivery

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02114

Re: AT&T Petition Requesting the Review and Reduction of Unbundled Network Element Recurring Charges, filed March 13, 2000; D.T.E. 00-___

Dear Ms. Cottrell:

In response to a petition filed by AT&T Communications of New England, Inc. ("AT&T") on March 13, 2000, with the Department of Telecommunications and Energy ("Department"), the Attorney General urges the Department to conduct an investigation immediately into the recurring charges by Bell Atlantic-Massachusetts ("Bell Atlantic") for unbundled network elements ("UNEs").

In its Petition, AT&T asks the Department to review and reduce the recurring charges that competitive local exchange carriers ("CLECs") must pay to obtain access to UNEs and combinations of UNEs, including the UNE Platform ("UNE-P"), from Bell Atlantic (Petition at 1). AT&T contends that the recurring charges for UNEs deter full-scale entry into the local market by CLECs (*id*. at 2). AT&T asserts that CLECs have to pay Bell Atlantic substantially more to lease UNE-P elements than Bell Atlantic charges its retail customers for the same service, and that Bell Atlantic's pricing methodology does not comport with forward-looking prices as required by the Federal Communications Commission (*id*. at 2, 4). AT&T argues that these charges create an unfair price squeeze on CLECs and erect anticompetitive barriers to CLEC entry into the local exchange market (*id*. at 3). On March 23, 2000, and May 18, 2000, WorldCom, Inc. filed letters with the Department supporting the Petition.

If these allegations are correct, the current level of Bell Atlantic's recurring charges for UNEs are a substantial and effective barrier to competition in the local telephone service market,

which conflicts with the 14-point checklist of Section 271 of the Telecommunications Act of 1996.[34] In these circumstances, the Department should begin its investigation into these allegations immediately as part of or in conjunction with the Department's investigation into Bell Atlantic's compliance with Section 271 in D.T.E. 99-271.

Sincerely,

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division
Office of the Attorney General
200 Portland Street, 4th Floor
Boston, MA 02114
(617) 727-2200

cc: Service list for D.T.E. 99-271

[34] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

ATTACHMENT C

MASSACHUSETTS ATTORNEY GENERAL'S JULY 18, 2000 COMMENTS TO THE DTE IN DTE 99-271

July 18, 2000

Sent via e-mail and by either fax, hand delivery or U.S. Mail

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

re: Bell Atlantic's Section 271 Filing, D.T.E. 99-271

Dear Secretary Cottrell:

Pursuant to the procedural schedules adopted in this proceeding on May 18, 2000, and June 9, 2000, the Attorney General submits his comments regarding Bell Atlantic's May 26, 2000, Supplemental Filing, together with a Certificate of Service.

Sincerely,

_____

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division

KJR/kr
cc: Cathy Carpino, Hearing Officer (2 copies)
Tina W. Chin, Hearing Officer (2 copies)
Robert Howley, Hearing Officer (w/enc.)
Service list for D.T.E. 99-271 (w/enc.)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Inquiry by the Department of Telecommunications and Energy pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market.	)	D.T.E. 99-271

COMMENTS OF THE ATTORNEY GENERAL ON BELL ATLANTIC'S MAY 26, 2000, SUPPLEMENTAL FILING

THOMAS F. REILLY
ATTORNEY GENERAL

By: George B. Dean, Chief
Karlen J. Reed
Assistant Attorneys General
Regulated Industries Division
Public Protection Bureau
200 Portland Street
Boston, MA 02114
(617) 727-2200

July 18, 2000

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COMMENTS OF THE ATTORNEY GENERAL
ON BELL ATLANTIC'S MAY 26, 2000, SUPPLEMENTAL FILING

The Attorney General hereby submits these comments to the Department of Telecommunications and Energy ("DTE" or "Department") pursuant to the May 18, 2000, and June 9, 2000, Memoranda of the Hearing Officers seeking comment on the Supplemental Filing ("Supplemental Filing") of New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic" or "Bell Atlantic-Massachusetts").[35] This matter concerns Bell Atlantic's application for entry into the long distance telephone market pursuant to Section 271 of the Telecommunications Act of 1996.[36]

[35] Supplemental Filing of Bell Atlantic, filed May 26, 2000.

[36] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified as amended in 47 U.S.C. § 271 (1996) and various other sections of 47 U.S.C. ("the Act").

The Attorney General has completed his review of the Supplemental Filing to ascertain from the consumer's perspective, whether Bell Atlantic has opened the local market to competition as measured by the 14-point competitive checklist contained in Section 271. In this context, the Attorney General has reviewed similar Section 271 filings submitted by Bell Atlantic-New York ("New York Application") and by SBC Communications (Texas) ("Texas Application") to the Federal Communications Commission ("FCC"), related Section 271 opinions issued by the U.S. Department of Justice and the New York Office of the Attorney General, and Section 271 orders issued by the New York Public Service Commission, the Pennsylvania Public Utilities Commission ("PAPUC"), and the FCC relating to the New York and Texas Applications and the pending Section 271 filing submitted to the PAPUC by Bell Atlantic-Pennsylvania. Based upon that review, the Attorney General concludes that Bell Atlantic has not yet satisfied the 14-point checklist contained in Section 271 of the Telecommunications Act of 1996, there being unresolved issues on digital subscriber line ("DSL") services, operational support systems ("OSS"), unbundled network elements ("UNEs"), and the Performance Assurance Plan ("PAP").

Specifically, the Attorney General recommends as follows:

1. DSL issues:
   a. The DTE should revise existing DSL performance measures (metrics) before final approval and should create DSL line sharing metrics as soon as possible.
   b. The DTE should investigate the costs of a separate data affiliate for DSL advanced services as part of the Section 271 record.

2. OSS issues:
   a. The Department should require Bell Atlantic-Massachusetts to fix all problems in its OSS.
   b. The initial draft report of the independent third-party tester, KPMG, should have been circulated to all participants for comment at the same time.

c. KPMG must finish testing the pre-order, order, and provisioning ("POP") domain of the OSS test to avoid New York-style problems.

3. The DTE should examine Bell Atlantic's UNE recurring charges and finalize its investigation into the UNE non-recurring charges.

4. The DTE should finalize the contents of the PAP.

I. SECTION 271 REQUIREMENTS

By enacting Section 271 of the Act, Congress allowed regional Bell operating companies ("RBOCs"), including Bell Atlantic-Massachusetts, to offer in-region, long distance telephone service if the RBOC demonstrates to the FCC that it meets four criteria: (1) satisfy the requirements of either Section 271(c)(1)(A) ("Track A") or Section 271(c)(1)(B) ("Track B");[37] (2) demonstrate that the local markets are open to competition as measured by a 14-point

[37] Under Track A, the RBOC must show that it has entered into one or more interconnection agreements with an unaffiliated carrier. 47 U.S.C. § 271(c)(1)(A). Under Track B, the RBOC must receive certification by the state commission regarding interconnection terms and conditions if the RBOC has not signed an interconnection agreement. 47 U.S.C. § 271(c)(1)(B). The New York 271 Approval and the Texas 271 Approval were Track A applications, and Bell Atlantic-Massachusetts is likewise a Track A filing.

competitive checklist;[38] (3) create and maintain a structurally separate affiliate to offer long distance service in compliance with Section 272 of the Act;[39] and (4) demonstrate that allowing the RBOC into the local market is in the public interest.[40] The FCC is required by law to consult with the U.S. Department of Justice and the applicable state public utilities commission.[41]

[38] 47 U.S.C. § 271(c)(2)(B)(I)-(xiv).

[39] 47 U.S.C. § 272(a).

[40] 47 U.S.C. § 271(d)(3)(C).

[41] 47 U.S.C. § 271(d)(2)(A), (B).

To date the FCC has considered seven such applications, granting only the New York and Texas Applications, on December 22, 1999, and June 30, 2000, respectively.[42] Related to the workings of these two recent "Section 271 approvals" are the FCC's approvals of the Bell Atlantic-GTE Corporation merger (June 16, 2000) and the SBC-Ameritech merger (October 8, 1999), which included local market-opening conditions such as the mandatory creation of

[42] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295 (released December 22, 1999) ("New York 271 Approval"); *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas,* Memorandum Opinion and Order, CC Docket No. 00-65 (released June 30, 2000) ("Texas 271 Approval").

separate data affiliates to provide advanced services (including xDSL).[43]

[43] *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* Memorandum Opinion and Order, CC Docket No. 98-184 (released June 16, 2000) ("BA-GTE Merger Approval"); *In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules,* Memorandum Opinion and Order, CC Docket No. 98-141 (released October 8, 1999) ("SBC-Ameritech Merger Approval"). The term "xDSL" refers to digital subscriber line technologies, which is a group to technologies designed to give the consumer high speed access to data and is more fully described herein.

The FCC has delegated some of its fact-finding authority in these investigations to the state public utilities commissions and, in that capacity, the Department opened this investigation to determine whether Bell Atlantic has complied with the 14-point checklist set forth in Section 271. This 14-point checklist measures Bell Atlantic-Massachusetts' ability to provide nondiscriminatory access for competitive local exchange carriers ("CLECs") to: (1) interconnection agreements;[44] (2) unbundled network elements;[45] (3) poles, ducts, conduits, and rights-of-way at just and reasonable rates;[46] (4) unbundled local loops;[47] (5) unbundled local trunk transport;[48] (6) unbundled local switching;[49] (7) 911 and E911 services, directory assistance, and operator call completion services;[50] (8) white pages directory listings for other carriers' service;[51] (9) numbering administration;[52] (10) databases and associated signaling for call routing and completion;[53] (11) permanent or interim local number portability;[54] (12) intraLATA

[44] 47 U.S.C. § 271(c)(B)(i) and 47 U.S.C. §§ 251(c)(2) and 251(d)(1).

[45] 47 U.S.C. § 271(c)(B)(ii), 47 U.S.C. § 251(c)(3) and 47 U.S.C. § 251(d)(1).

[46] 47 U.S.C. § 271(c)(B)(iii).

[47] 47 U.S.C. § 271(c)(B)(iv).

[48] 47 U.S.C. § 271(c)(B)(v).

[49] 47 U.S.C. § 271(c)(B)(vi).

[50] 47 U.S.C. § 271(c)(B)(vii)(I), (II), and (III).

[51] 47 U.S.C. § 271(c)(B)(viii).

[52] 47 U.S.C. § 271(c)(B)(ix).

[53] 47 U.S.C. § 271(c)(B)(x).

[54] 47 U.S.C. § 271(c)(B)(xi).

toll presubscription;[55] (13) reciprocal compensation arrangements;[56] and (14) resale arrangements.[57]

In the Texas 271 Approval, the FCC identified four elements that were important to its evaluation of whether Texas' local telephone markets were, in fact, open to competition: (1) full and open participation by all interested parties; (2) independent third party testing of the operational readiness of Southwestern Bell Telephone's OSS; (3) development of clearly defined performance measures and standards; and (4) adoption of performance measures that ensure future compliance with the section 271 checklist. Texas 271 Approval, News Release at 2. The Attorney General urges the Department to use these elements as the lodestar throughout the remaining portion of its investigation into Bell Atlantic-Massachusetts' Section 271 filing.

[55] 47 U.S.C. § 271(c)(B)(xii).

[56] 47 U.S.C. § 271(c)(B)(xiii).

[57] 47 U.S.C. § 271(c)(B)(xiv), 47 U.S.C. § 251(c)(4).

The Attorney General has participated in this investigation to date by appearing at public hearings, filing comments, responding to various motions, and participating in on-going discussions led by KPMG, the third-party overseer retained by the DTE to test and evaluate Bell Atlantic's operational support systems ("OSS"). The Attorney General intends to remain an active participant in this docket throughout the technical sessions and panel hearings/ oral arguments and, if Bell Atlantic-Massachusetts is allowed to serve the long distance market, through subsequent monitoring of the implementation of its Section 271 approval and compliance.[58]

[58] According to the July 14, 2000, Hearing Officer Memorandum, KMPG must submit its initial draft report to Bell Atlantic and the DTE for comment on July 17, 2000, must issue a revised draft report to CLECs for comment on July 26, 2000, and must issue a second revised draft report to the DTE, Bell Atlantic, and CLECs on August 7, 2000. The DTE will commence a round of non-OSS technical sessions on August 14, 2000, and OSS technical sessions on August 28-30, 2000. Furthermore, panel hearings and/or oral arguments are scheduled for September 7-8, 2000. This revised procedural schedule does not specify when KPMG must issue its final

II. UNRESOLVED ISSUES AND RECOMMENDATIONS

report.

Bell Atlantic filed more than 900 additional pages of supplemental public information on May 26, 2000, in an attempt to bolster its argument that it has opened the local market to competition by satisfying the Section 271 14 point checklist and complied with the OSS requirements.[59] The Attorney General challenges that assertion and has identified several unresolved substantive issues regarding DSL, UNE, OSS, and certain unresolved procedural issues involving the PAP and associated programs. Herein the Attorney General respectfully offers his recommendations to the Department on each issue. This list is by no means intended to be a complete description of every flaw in Bell Atlantic's supplemental filing; the identified issues, however, are those that may affect Massachusetts consumers significantly and adversely if not addressed by Bell Atlantic and/or the Department.

A. The Department must resolve the outstanding DSL and DSL Line Sharing issues prior to final approval.

[59] Supplemental Filing at 1.

As part of the compliance requirements under Section 271, Checklist Item Number 4 (unbundled local loops), the Department is examining whether Bell Atlantic is providing non-discriminatory access to the high frequency portion of the local copper loop so that CLECs can compete against Bell Atlantic to provide customers with digital subscriber line ("xDSL") services. [60] The FCC ruled in its Line Sharing Order that the high frequency portion of the local loop should be unbundled from the remainder of the loop as an unbundled network element.[61] This ruling requires Bell Atlantic-Massachusetts to "line share" with CLECS so that Bell Atlantic-Massachusetts and CLEC can compete to provide DSL service for access to data over the high frequency portion of the loop, with Bell Atlantic-Massachusetts continuing to provide voice services over the low frequency portion of the same copper loop. Failure to do so will, as noted

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[60] The term "xDSL" refers to a group of technologies used to transmit high-speed data over copper wires, or loops, and the group is often loosely referred to as "DSL" when, in fact, there are several types of DSL technologies used today by Bell Atlantic and CLECs to give customers access to the Internet and other broadband services. For example, asymmetrical DSL ("ADSL") can be used to transmit Internet data at high speeds from the customer to the phone company at up to 640 kilobits per second (Kbps) (called "upstream"), and from the phone company to the customer at up to 6 megabits per second (Mbps) (called "downstream") and hence the asymmetrical aspect of this data transmission technology. *D.T.E. 98-57 Phase III*, Testimony of Bruce Meachem, Bell Atlantic, June 14, 2000, at 5-6. Bell Atlantic and some CLECs currently uses ADSL to provide voice and/or data services to their customers over the same telephone line. Bell Atlantic's DSL conditioning and line sharing tariff in DTE 98-57 Phase III addresses both ADSL and high bit-rate DSL ("HDSL"). HDSL uses either a two-wire or four-wire copper loop and can transmit data signals symmetrically (both upstream and downstream) at rates from 784 Kbps to 1.5 Mbps (*id*.). Other types of xDSL technology not covered in the DTE 98-57 Phase III tariffs are universal DSL ("UDSL"), very high speed DSL ("VDSL"), rate adaptive DSL ("RADSL"), symmetrical DSL ("SDSL"), and integrated DSL ("IDSL"). *DTE 98-57 Phase III*, Testimony of Amy Stern, June 14, 2000, at 2, 5.

[61] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, and Implementation of the Local Competition Provisions of the Telecommunication Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 (released December 9, 1999) ("Line Sharing Order").

by the U.S. Department of Justice in its initial evaluation of the SBC - Texas Section 271 application to the FCC, "seriously retard the deployment of such services and competition in their provision."[62]

[62] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas,* Evaluation of the United States Department of Justice, CC Docket No. 00-4 (filed 2/14/00), Evaluation at 1.

The DTE is investigating Bell Atlantic's DSL conditioning and line sharing tariff provisions for asymmetric DSL ("ADSL") and high bit density DSL ("HDSL") as part of Phase III of DTE 98-57, with evidentiary hearings set to commence on August 1, 2000, and final decision on all approved DSL line sharing issues no later than September 18, 2000. Because DSL line sharing holds such great potential to bring high speed access to broadband services for Massachusetts residential and small business consumers, the DTE should resolve the outstanding DSL line sharing issues prior to giving the FCC a favorable recommendation for Bell Atlantic to enter the long distance market.[63] In addition, the DTE must be prepared to create DSL line

[63] The U.S. Department of Justice has expressed the same concern in its recent re-evaluation of the SBC-Texas Section 271 Application: "We emphasize, however, that future applications may require more than SBC has demonstrated in this application because of continuing developments in the market for advanced services. For example, the Texas PUC is currently conducting proceedings to implement line sharing. The Commission should, of course, carefully monitor SBC's compliance with the line sharing order given its great importance to the future development of competition for advanced services." *In re Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region,*

sharing metrics in the very near future because the Master Test Plan of Bell Atlantic's OSS does not include DSL line sharing.[64] Consequently, there are no measurements for missed appointments, lost lines, or other relevant metrics for line sharing. The Attorney General renews his call for the creation of a metrics working group to consider and resolve such issues.[65]

1. The Department should be ready to revise existing DSL metrics and create DSL line sharing metrics.

As part of its investigation, the DTE should closely examine Bell Atlantic-Massachusetts'

InterLATA Services in Texas, CC Docket No. 00-65, DOJ Ex Parte Submission (June 13, 2000).

[64] Bell Atlantic-Massachusetts should have referenced this omission in its discussion of line sharing in the Supplemental Filing at pages 108-109; instead, Bell Atlantic provides an unspecific reference to collaborative sessions on DSL occurring in New York and to a New York DSL test pilot program, the results of which appear to have been available on June 8, 2000, but were not included in the Supplemental Filing.

[65] *See* Attorney General Comments filed April 25, 2000, at 5-6.

compliance with the existing DSL metrics to ensure that Bell Atlantic's performance is adequately captured, accurate analyzed, and appropriately subject to remedies for discriminatory service to CLECs. This is of critical importance because Bell Atlantic-Massachusetts has or soon will launch its separate data affiliate to compete against CLECs for xDSL market share. In the Bell Atlantic-Massachusetts Master Test Plan, the Department ordered KPMG to test Bell Atlantic's DSL services; however, the metrics used to evaluate those tests may not be fully developed and appear to be under scrutiny as part of the DTE 98-57 Phase III consideration of the Bell Atlantic DSL and line sharing tariff.

The Master Test Plan adopted by the DTE on November 19, 1999, and amended January 14, 2000, does not appear to incorporate the March 9, 2000, modifications by the New York Public Service Commission to include DSL-specific metrics in its Carrier-to-Carrier metrics guidelines.[66] Given the significance of DSL, the DTE should revise the existing DSL metrics and incorporate additional appropriate DSL metrics and DSL line sharing metrics based on its DTE 98-57 Phase III investigation and on the New York DSL metrics adopted by the New York Public Service Commission on March 9, 2000.

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[66] See *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant Section 252*, New York Public Service Commission ("NYPSC") Docket No. 97-C-0271, and *Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan*, NYPSC Docket No. 99-C-0949, Order Amending Performance Assurance Plan (issued March 9, 2000).

2. The Department should investigate and monitor the costs of the structurally separate affiliate for advanced services.

On June 16, 2000, the FCC approved the proposed merger of Bell Atlantic and GTE, subject to a long list of conditions which include creating a structurally separate affiliate for advanced services.[67] The FCC-imposed merger conditions require the use of a data affiliate that uses the same processes as competitors, pay an equivalent price for facilities and services, and is subject to an annual comprehensive audit.[68] The creation of a separate data affiliate will, undoubtedly, make detection of discriminatory treatment more transparent; however, creation of a data affiliate could increase the overall costs and prices to consumers for advanced services through duplication of facilities, personnel, and procedures.

The record developed by the DTE in its Section 271 investigation contains no data at all regarding such potential increased consumer costs and prices, even though the FCC's separate data affiliate requirement directly impacts Massachusetts consumers. The DTE should require Bell Atlantic-Massachusetts, as part of its compliance with Section 272 of the Telecommunications Act of 1996 regarding separate affiliate compliance, to disclose its best estimate of those costs before the Department issues its final recommendation on Bell Atlantic-Massachusetts' Section 271 filing. Furthermore, the DTE must remain vigilant in monitoring the separate data affiliate to assure that the same expenses are not recovered twice in Bell Atlantic-Massachusetts' upcoming price cap compliance filing or subsequent price cap plan.[69]

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[67] Bell Atlantic-GTE Merger Approval, *supra*.

[68] *Id.*

[69] See *NYNEX*, D.P.U. 94-50 (1995). Bell Atlantic has not yet submitted either its Sixth Annual

B. OSS issues regarding observations and exceptions, KPMG's initial draft report, and the POP-Domain remain to be resolved.

Another part of the Department's investigation into Bell Atlantic's Section 271 filing that remains incomplete is the examination of the operation support systems ("OSS") that Bell Atlantic uses to pre-order, order, provision, bill, maintain and repair the various elements of network services for its retail and wholesale CLEC customers. As stated in the Master Test Plan, Bell Atlantic is required to:

Price Cap Compliance filing, covering the period of July 1, 2000 to June 30, 2001, or its expected new price cap plan.

> provide nondiscriminatory access to its operations support systems (OSS) on appropriate terms and conditions, provide the documentation and support necessary for competitive local exchange carriers (CLECs) to access and use these systems; and demonstrate that BA-MA's systems are operationally ready and provide an appropriate level of performance.[70]

KPMG LLP is serving as the third-party tester of Bell Atlantic's OSSs and has divided the OSS test into five domains which reflect the five basic business functions within the Bell Atlantic-CLEC relationship: pre-ordering, ordering, and provisioning ("POP"); maintenance and repair; billing; relationship management and infrastructure; and performance metrics. As part of the OSS test, KPMG compares measurements of Bell Atlantic's performance within each domain against a corresponding set of evaluation criteria used to analyze Bell Atlantic's OSS performance. The DTE has required Bell Atlantic to report its performance measured using the New York Carrier-to-Carrier Metrics, as periodically supplemented by the New York Public Service Commission, which were developed in connection with Bell Atlantic-New York's Section 271 application.[71]

1. Observations and exceptions should be fixed before approval.

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[70] Letter Order on Master Test Plan, filed November 19, 1999, and Letter Order on Attachment A to Master Test Plan, filed January 14, 2000.

[71] January 14, 2000, Letter Order at 7.

The Attorney General recommends that the DTE not approve Bell Atlantic-Massachusetts' Section 271 filing until and unless all exceptions are cleared and all observations are resolved, as was ordered by the Pennsylvania Public Utilities Commission ("PAPUC") on June 8, 2000, as part of its Bell Atlantic-Pennsylvania's ("BA-PA") Section 271 investigation.[72] Commissioner Fitzpatrick of the PAPUC sponsored the underlying motion because of "uncertainty as to whether the OSS of BA-PA is capable of handling increased volumes when CLECs begin mass marketing of their local services."[73] The Attorney General has the same concern regarding Bell Atlantic-Massachusetts' OSS systems and urges the DTE to follow the Pennsylvania lead, rather than face the consequences of thousands of lost orders as in New York.

KPMG publishes and updates reports periodically to the DTE and participants on various "observations" of suspected deficient performance, which may or may not be resolved and which may or may not be escalated into the more serious category of "exceptions." With each observation, Bell Atlantic and CLECs have an opportunity to comment and Bell Atlantic has the opportunity to solve the problem noted by KPMG. If the problem is resolved to KPMG's satisfaction, then KPMG will close the observation; otherwise, resolution of the observation is deferred until a later date. As of June 29, 2000, KMPG noted over 100 primary observations and numerous sub-issues, of which 32 primary observations and several sub-issues remain deferred

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[72] On June 8, 2000, the Pennsylvania Public Utilities Commission ("PAPUC") ordered Bell Atlantic-Pennsylvania to analyze, reveal, and fix the root cause of problems identified by KPMG during the Pennsylvania OSS tests. PAPUC Public Meeting, June-2000-C-3, *Operations Support Systems of Bell Atlantic-PA, Inc.*, Motion of Commissioner Terrance J. Fitzpatrick (approved by full PAPUC Commission on June 8, 2000).

[73] *Id.* at 2.

(open). KPMG will escalate an observation into an exception if KMPG determines that the element of the test will fail. As of June 29, 2000, KMPG had noted nine primary exceptions and many sub-issues, of which six primary exceptions and several sub-issues remain open.

Requiring Bell Atlantic-Massachusetts to fix all problems reported by KPMG appears to be within the philosophy of "test until you pass" envisioned by the DTE in the Master Test Plan.[74] KMPG's test of Bell Atlantic-Massachusetts' OSS systems will play a vital role in determining whether competitors have access to Bell Atlantic's systems and whether those systems are performing adequately. The experience of the New York Public Service Commission in cleaning up OSS problems earlier this year has demonstrated clearly the need for functioning OSS systems and adequate OSS testing.[75]

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[74] See, *e.g.*, Master Test Plan at 19-21, 169, and 173.

[75] See, *e.g.*, NYPSC Order Directing Market Adjustments and Amending Performance Assurance Plan, Cases Nos. 00-C-0008, 00-C-0009, and 99-C-0949, issued March 23, 2000 (ordering Bell Atlantic-New York to provide $10 million in bill credits to eligible CLECs for deficient service to

2. The KPMG initial draft report should have been sent to all at the same time.

CLECs, amending the Performance Assurance Plan to add three new metrics, and adding $2 million per month to the Performance Assurance Plan for the new measures).

On June 22, 2000, the DTE announced to CLECs during a KPMG CLEC conference call that it would circulate KPMG's initial draft report only to Bell Atlantic and would allow KPMG to release a second draft report following Bell Atlantic's review and comment, which the DTE would then release to all participants in this investigation. Several CLECs voiced their concern during the conference call over the lack of access to the initial draft report, and the ability of Bell Atlantic to dictate the contents of the draft report based on its "sneak preview." CLECs also asserted that CLEC input was instrumental in the consideration by the FCC and the New York Public Service Commission of Bell Atlantic-NY's Section 271 application and initial draft report. On July 14, 2000, the DTE issued a revised procedural schedule adhering to its stated intention to prevent CLECs from reviewing the initial draft OSS report and allow Bell Atlantic to comment on the initial draft report.[76]

The Attorney General recommends that the DTE allow public inspection of the initial draft report, together with the initial comments to this report submitted to KPMG by the DTE and by Bell Atlantic. The FCC, in its recent Texas 271 Approval, stated that an important element in opening the local market to competition was the "full and open participation by all interested parties."[77] In the pursuit of a more open evaluation process, the Attorney General urges the DTE to release the initial draft and all comments for public inspection so that all participants know all the issues raised in the report. While it may be within the DTE's discretion, under its delegated authority from the FCC under Section 271, to give Bell Atlantic a private preview and

[76] See footnote 24, *supra*.

[77] Texas 271 Approval, News Release at 2.

opportunity to comment on the initial draft report, the overall purpose of this proceeding -- to promote local competition -- will not be served best by shielding Bell Atlantic's failings from the public eye. Moreover, the DTE and consumers will lose the benefit of the insights by CLECs who will actually use Bell Atlantic's OSS if CLECs are not allowed to inspect and comment on KPMG's initial findings.

Additionally, the DTE should have required KPMG to release the initial draft of KMPG's report to all participants at the same time so that all participants have an equal opportunity to address the issues raised by KMPG's report and to prepare expert testimony for the OSS technical sessions. Given the current procedural schedule, Bell Atlantic has an additional ten calendar days (July 17 versus July 27) to analyze the report and prepare for the OSS technical sessions, scheduled to commence August 28, 2000. Finally, the July 14, 2000, revised procedural schedule does not specify a date for the issuance of KPMG's final report; the Attorney General recommends that the DTE should either clarify that the final report will be issued on August 7, 2000, or specify another date following conclusion of the OSS technical sessions.

3. OSS - POP domain questions remain open.

KPMG is still testing all five domains of Bell Atlantic-Massachusetts' OSS, yet one test within the pre-order, order, and provisioning ("POP") domain, the POP Capacity Management Evaluation test, deserves specific attention.

In its February 16, 2000, Letter Order, the DTE approved KPMG's request to reduce the level of volume testing in the POP domain from an 18-month level (Mid-year 2001) to a 6-month level. The DTE stated in this Letter Order that the volume troubles occurring in New York did

not merit rejecting KPMG's recommendation; instead, the DTE asserted that these troubles show that KPMG will have to focus heavily on another part of the POP domain test, the POP Capacity Management Evaluation test.[78] The POP capacity management evaluation test is designed to review Bell Atlantic's plans for projected growth in the use of the interfaces for wholesale, pre-order, order, and provisioning. Essentially, the DTE ordered KPMG to make sure that Bell Atlantic's OSS satisfied the exit criteria for this test. Until KPMG issues its final report on Bell Atlantic's OSS, the Department has an insufficient basis upon which to gauge whether Bell Atlantic is able to handle the volume of orders that caused problems in New York. The Attorney General urges the DTE to carefully review the results of this specific test before agreeing that Bell Atlantic-Massachusetts has satisfied this portion of the OSS test.

C. Unbundled network element (UNE) recurring and non-recurring charges should be examined.

[78] Master Test Plan, 8.0 POP 8, at. 71-73.

Access to unbundled network elements ("UNEs"), Checklist Item Number 2,[79] is one of the key means for CLECs to enter the local market and compete against Bell Atlantic for customers. Indeed, Bell Atlantic recognizes this method as a "mode of entry" in its proposed Performance Assurance Plan and has proposed statistics that seek to measure the success of this entrant strategy -- all the more reason to assure that the charges Bell Atlantic make to CLECs for UNEs, both recurring and non-recurring, are based on forward-looking, total element long-range incremental costs ("TELRIC"), rather than on inflated historical costs.[80]

The Attorney General previously urged the DTE to examine and implement appropriate UNE provisioning procedures in his July 19, 1999 comments.[81] The DTE has begun an investigation into reviewing Bell Atlantic's non-recurring charges as part of its Consolidated Arbitrations docket and is expected to issue an order shortly. However, the DTE has not begun investigating allegations raised by AT&T Communications of New England, Inc. ("AT&T")

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[79] 47 U.S.C. § 271(c)(B)(ii).

[80] Bell Atlantic proposed Performance Assurance Plan, filed April 25, 2000, at 3.

[81] Attorney General Comments, filed July 19, 1999, at 3.

regarding Bell Atlantic's recurring charges for switching and the cost of capital.

1. UNE recurring charges should be reviewed.

On March 13, 2000, AT&T filed a petition with the DTE to review Bell Atlantic's recurring charges for unbundled network elements ("AT&T's UNE Petition").[82] Of specific concern to AT&T are the UNE rates for switching and the cost of capital.[83] WorldCom, Inc. ("WorldCom") has filed two letters supporting AT&T's UNE Petition,[84] contending that Bell Atlantic's UNEs are priced so high for competitors that a CLEC must pay Bell Atlantic $36 for the same UNEs Bell Atlantic charges its retail customers only $24.[85] The Attorney General has supported AT&T's request that the DTE open an investigation into the allegations of several CLECs that Bell Atlantic's recurring rates for UNE and UNE-P have created barriers to local competition and are applied in an anti-competitive manner.[86] If any of these allegations are

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[82] AT&T Petition Requesting the Department to Review and Reduce Existing Recurring Charges for Unbundled Network Elements, filed March 13, 2000 ("AT&T UNE Petition").

[83] *Id*. at 3-8.

[84] WorldCom letters dated March 23, 2000, and May 18, 2000.

[85] WorldCom letter dated May 18, 2000, at 1.

[86] Attorney General letter dated May 30, 2000.

correct and are not addressed, then consumers will bear the ultimate burden of Bell Atlantic's discriminatory treatment in the form of higher prices and fewer choices.

To date, Bell Atlantic has not responded to AT&T's UNE Petition and the DTE has not formally opened an investigation as urged by the Attorney General. This creates a cloud over Bell Atlantic's Section 271 application that may form the basis for a finding by the Department of Justice or the FCC that Bell Atlantic has not satisfied Checklist Item Number 2 regarding unbundled network elements. Consequently, the Department should open an investigation into Bell Atlantic's recurring charges for UNEs before the DTE issues its final recommendations on Bell Atlantic's 271 application.

2. The DTE should conclude its UNE non-recurring charges review.

The Department conducted evidentiary hearings on allegations raised by several CLECs on Bell Atlantic's non-recurring UNE charges on June 20 and 23, 2000.[87] These arbitration hearings are designed to investigate a limited set of issues identified by AT&T and WorldCom.

For the same reasons outlined above, the Attorney General urges the Department to review the testimony and complete its investigation into the non-recurring portion of the UNEs by issuing its order prior to issuing final recommendations on Bell Atlantic's Section 271 application.[88]

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[87] These hearings were conducted as part of the Department's *Consolidated Arbitrations* docket, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.

[88] At the conclusion of hearings, the DTE requested initial briefs by CLECs by August 4, 2000, reply brief by Bell Atlantic by August 18, 2000, with CLEC reply briefs due by August 25, 2000. *Consolidated Arbitrations*, Tr. vol. 46, page 25 (June 23, 2000). The DTE has not indicated when a final order will be issued in this matter.

D. Performance Assurance Plan Issues Must be Resolved.

The Attorney General submitted comments to the DTE on the necessity and preferred contents of a Performance Assurance Plan ("PAP"), Quality Assurance Program ("QAP"), and Change Control Assurance Plan ("CCAP") on April 25, 2000. The Department has received reply comments and has not yet issued its order setting forth the terms of the PAP, QAP, and CCAP.

As the Attorney General has asserted, Bell Atlantic should have these components in place and ready for implementation prior to receiving a favorable recommendation from the DTE.[89] The New York experience demonstrates clearly the need for a mechanism to evaluate allegations of anticompetitive behavior and enforce remedies to those most directly affected by discriminatory treatment.

III. CONCLUSION.

For the foregoing reasons, the Attorney General submits that Bell Atlantic has not complied with Section 271 of the Telecommunications Act of 1996 because of unresolved substantive issues surrounding DSL, OSS, and UNE. Furthermore, Bell Atlantic's Section 271 petition should not be approved until the Department resolves procedural issues regarding the Performance Assurance Plan and related compliance assurance programs.

Respectfully Submitted,

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[89] Attorney General Comments on Performance Assurance Plan, April 25, 2000, at 2.

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Inquiry by the Department of Telecommunications and Energy pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market.	)	D.T.E. 99-271

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by e-mail and by either hand delivery, mail, or fax.

Dated at Boston this 18th day of July 2000.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts	)	CC Docket 00-176

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